IN THE
SUPREME COURT OF MISSOURI

No. SC93719

DANIEL B. NICKELL,

Plaintiff Appellant,

v.

MICHAEL F. SHANAHAN, *et al.*,

Defendants and Respondent.

Appeal from the Circuit Court of St. Louis City, Missouri
Division 31, Honorable Joan L. Moriarty, Circuit Judge
Circuit Court Case No. 0822-CC09449-01

BRIEF OF AMICI CURIAE LILLIAN THERESA RUYLE AND LINDA ANN HOFFMAN

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1. Interest of Amici

Amici are Plaintiffs, with others, in an action presently pending in the Circuit Court for St. Charles County, Missouri, at file no. 1311-CC00827, captioned *Signature Group Holdings, Inc. v. First Bank, et al.*

Movants allege in their Third Amended Petition a claim or claims for relief against Defendant First Bank for aiding and abetting James Thurman, president of Phoenix Title, Inc., in embezzling $153,615.04, which had been deposited by Movants, as buyers, in Phoenix Title's escrow bank account with First Bank.

It is recognized that escrows are an express trust and that Phoenix Title had fiduciary duties to the Ruyles. In light of Federal know your customer statutes and regulations, banks are liable for aiding and abetting this sort of garden variety fraud by local title agents who utilize an escrow bank account to work the fraud. *E.g., First American Title Insurance Company v. Westbury Bank*, No. 12-CV-1210, 2013 WL 1677911 (E.D. Wis. Apr. 17, 2013) (attached).

2. Argument

Defendant Newman—urging that he should have no civil aiding and abetting liability even though he participated in the fraud worked by ESSI's officers and directors—is requesting that this Court overturn doctrine that is more than 175 years old, doctrine which has been affirmed in scores of cases.

Contrary to Newman's assertions, Missouri applied aiding or abetting liability for breach of trust or fiduciary duty expressly, in *Massie v. Barth* [1]

> Plaintiffs charge that defendant Fred conspired with trustee Barth to help trustee Barth violate his fiduciary obligation. "A third party who has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust. Restatement of Trusts, Second § 326 (1957).

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[1] *Massie v. Barth*, 634 S.W.2d 208 (Mo. Ct. App. 1982); *accord Deutsch v. Wolff*, 994 S.W.2d 561, 567 (Mo. 1999) ("Fifth, the pleading clearly alleged a breach of a fiduciary obligation, and assistance in that breach by the Accountant.") and *Brown v. United Missouri Bank, NA*, 78 F.3d 382, 387 (8th Cir. 1996) (third party liable for loss if on notice of and participates in trustee's breach of trust).

A. Introduction

Plaintiff Daniel B. Nickell's petition, as amended, alleges Defendant Mark S. Newman, chief executive officer and chairman of DRS Technologies, Inc., aided, abetted, counseled or encouraged and also provided substantial assistance to the officers and directors of Engineered Support Systems, Inc. in their breaching their fiduciary duties during the course of DRS's acquisition of ESSI by merger.

Amici understand that Nickell's theory is that ESSI's Registration Statement—prepared and issued by ESSI's officers and directors—made absolutely no mention of the backdating of stock options that had taken place at ESSI prior to the merger. Appellant's COA Opening Brief at 6–7.

Even if officers and directors have no general duty to speak to shareholders,[2] when officer and directors do undertake to speak to shareholder through a Registration Statement seeking approval of a merger or acquisition they have a duty to tell the whole truth for, as Prosser writes, "half of the truth may obviously amount to a lie, if it is understood to be the whole."[3]

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[2] *See In Re Wayport, Inc. Litigation*, 76 A.3d 296, 314 (Del. Ch. 2013) (The "duty of disclosure is not an independent duty, but derives from the duties of care and loyalty." *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del.2009)).

[3] Prosser and Keeton on Torts § 106, at 738 c.2 (5th Ed. 1984); *accord, e.g., Constance v. BBC Development Co.,* 25 S.W.3d 571, 585 (Mo. Ct. App. 2000); *Reis v. Peabody Coal Co.*, 997 S.W.2d 49, 60 (Mo. Ct. App. 1999).

Nickell charges that the Registration statement did not disclose the whole truth and was fraudulent is therefore a pleading of a cause of action for deceit or fraud. The Second Amended Petition charges, in effect, that Newman knowingly encouraged and assisted this fraudulent course of conduct.

B.Newman's liability arises from his participating in the fraud.

One who participates in a fraud is of course guilty of fraud, and one who, with knowledge of the facts, assists another in the perpetration of a fraud is equally guilty by having aided and abetted the fraud. *Petrol Properties, Inc. v. Stewart Title Co.*, 225 S.W.3d 448, 455 (Mo. Ct. App. 2007); *Reis v. Peabody Coal Co.*, 997 S.W.2d 49, 73 (Mo.App. E.D. 1999) (quoting *Hobbs v. Boatright*, 195 Mo. 693, 93 S.W. 934, 939-40 (1906)).

In *Leimkuehler v. Wessendorf* the court said,"The gist of the action is fraud, and all defendants who participated therein are liable."[4] Nor does the fact that the person used as an agent to convey the representation is innocent relieve the party charged with fraud.[5] Anyone of several persons participating in perpetration of actionable fraud become a fraudfeasor and is liable, irrespective of proof of concert of action on part of some or all.[6] The liability of persons participating in fraudulent transactions is joint and several with-

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[4] *Leimkuehler v. Wessendorf*, 18 S.W.2d 445, 452 (1929).

[5] *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 551 (Mo. Ct. App. 1983).

[6] *Orlann v. Laederich*, 92 SW2d 190, 194 (1936).

out regard to which of the persons reaped the fruits of the fraudulent transaction.[7]

Newman implicitly requests this Court to overturn all these decisions (and many others) by miscasting the issue as being whether one can aid or abet the breach of fiduciary duty. Whether ESSI's officers and directors were also fiduciaries is surplus age. Whether or not they were fiduciaries adds nothing to the analysis of Defendant Newman's liability. This is because their liability as officers and directors rests on their having voluntarily spoken by and through the registration statement.[8]

C. Numerous Missouri cases which have held that a parties' knowing participation in a wrong subjects that party to joint and several liability, as a tortfeasor, with the principal.

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[7] *Blasinay v. Albert Wenzlick Real Estate Co.*, 138 S.W.2d 721, 724 (Mo. Ct. App. 1940).

[8] Courts have created a great deal of confusion buy failing to recognize the distinctions that must be drawn, in context, between fiduciary duties, tortious action, breach of contract, and negligence. *See generally* Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. Rev. 235 (1994) (discussing breach of fiduciary duty, breach of contract, and the tort of negligence as three distinct legal theories potentially available in a legal malpractice case).

The parties, the courts below, and even members of this Court act as if liability for another's wrong doing is some new concept to the law. It is not. One member of this Court erroneously wrote, when a court of appeal's judge, "Plaintiff has not cited any Missouri case which recognizes a claim for aiding and abetting in the commission of a tort, and none were located through the Court's own research.[9] Respectfully, there several score of Missouri cases to the contrary, many of which we will cite and discuss, below.

The Western District partially corrected this statement one year later, in *Shelter Mut. Ins. Co. v. White.*[10] by adopting Section 876(b) of the Restatement of Torts and recognizing a cause of action, in negligence, against a passenger who encouraged the driver to operate the vehicle negligently resulting in a fatal pickup truck wreck. *Shelter Mutual* stated the legal theory of aiding and abetting had been noted "with apparent favor"[11] by the Missouri Supreme Court in 1984 in *Zafft v. Eli Lilly and Company.*[12] This was statement was inaccurate for the doctrine had been settled Missouri law since the Civil War. And, had the Court in *Shelter Mutual* looked a little harder it found

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[9] *Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo. App.1995).

[10] *Shelter Mut. Ins. Co. v. White*, 930 S.W.2d 1, 4 (Mo. App. 1996).

[11] 930 S.W.2d at 4.

[12] *Zafft v. Eli Lilly and Company*, 676 S.W.2d 241, 245 (1984).

have found that Missouri adopted Section 876 from the First Restatement in 1964 in *Campbell v. Preston*, an earlier negligence case.[13]

*Shelter Mutua*l's failure to cite *Campbell* is inexplicable for in Campbell this Court stated:[14]

> Where a person actively participates as by expressly ordering or directing the act which proves to be negligent or wrongful, such person is liable to a third person damaged thereby even though the relation of employer and employee does not exist between the one who directs the act and the one who performs it. Restatement of the Law Second, Agency 2d, § 212, Comment a; Restatement of the Law of Torts, § 876; 57 C.J.S. Master and Servant § 557, p. 268.

Civil liability for aiding and abetting hasn't been just noted with favor; civil aiding and abetting liability has been a central part of Missouri law for more than 175 years.

D. Liability for another's wrongdoing is not a new concept to the law.

The Bible recognized that it was wrong to help another commit wrong.[15] By 1613 English common law recognized joint liability on all who

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[13]*Campbell v. Preston*, 379 S.W.2d 557, 561 –62 (Mo. 1964).

[14] 379 S.W. 2d at 561–62.

[15] *Proverbs* 1:10–19 (King James).

came together to commit the trespass of battery.[16] Aiding and abetting criminal activity is an ancient doctrine.[17]

E. What is aiding and abetting liability.

Aider and abettor "as used with reference to civil liability . . . has been defined as any person who is present at the commission of a tort, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same."[18] It is distin-

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[16] *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151 (K.B. 1613).

[17] *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994) (stating [a]iding and abetting is an ancient criminal law doctrine.").

[18] *Knight v Western Auto Supply Co.*, 193 S.W.2d 771, 776 (1946).

guishable from civil liability for conspiracy,[19] although both fall under the rubric of "concerted action."[20]

F. Liability for Reasonably Anticipated Wrongs.

Aiding and abetting is always "forward looking," focusing on whether the defendant should have anticipated how his or her actions will affect the actions of the primary wrongdoer. And, civil aiding and abetting differs from criminal aiding and abetting. The intent standard in the civil tort context requires only that the tortuous or criminal conduct aided or abetted be the "natural consequence of [one's] original act;" criminal intent to aid and abet requires that the defendant have a "purposive attitude" toward the commission of the offense.[21] The test for aiding and abetting liability is whether im-

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[19] *Id.*, 193 S.W.2d at 776 ("There is something more submitted therein [by and aiding and abetting instruction] than a mere conspiracy."); *Haynie v Jones,* 127 S.W.2d 105, 111 (Mo. Ct. App. 1939) ("Proof of a conspiracy is not necessary"); *see generally* Nathan I. Combs, Note, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241, 257 (2005) ("The requirement of agreement in the civil conspiracy analysis represents the crucial distinction from civil aiding and abetting, which requires no agreement to constitute the tort.").

[20] Id. at 256–260.

[21] *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir.1938); *accord Rice v. Paladin Enterprises, Inc.*, 128 F. 3d 233, 251 (4th Cir. 1997) (publisher of book

posing liability will serve the purpose of the law by deterring unlawful activity or crime.[22] Accordingly, a defendant is liable when she should "reasonably have anticipated that" the wrong would follow from the conduct she was aiding, abetting, or encouraging.[23] This rule flows from the common law rule of criminal liability; "Under the common law a defendant was liable for the natural and probable consequences of an intended criminal offense."[24] Defendants are liable civilly for the natural and probable consequences of their intended acts. If a tort is reasonably anticipated, there is liability.

An early case of bank liability for aiding and abetting a fraud, *Hobbs v. Boatright*,[25] illustrates how courts apply the rule. *Hobbs* was a suit to recover $6,000 lost to the Buckfoot gang. The gang worked through the Webb City Athletic Club, " professing to be composed of the wealthy miners and other

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instructing on how to commit a contract murder had civil liability for aiding and abetting ***sans*** any knowledge of crime); *see generally United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (Posner, J.) (discussing aiding and abetting liability of a fire arms dealer for selling a gun to a customer who has announced he wants to buy a gun in order to kill his mother),

[22] *See generally United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (Posner, J.).

[23] *Raybourn v. Gicinto*, 307 S.W.2d 29, 31 (Mo. 1957).

[24] *State v Evans*, 694 S.W.2d 860, 863 (Mo. App. 1985)

[25] *Hobbs v. Boatright*, 93 S.W. 934 (Mo. 1906).

responsible business men in that vicinity who were fond of athletic sports and desired to give encouragement to such in a high-minded way."[26] The Buckfoots were:

> [E]ngaged in promoting foot races, in which they arranged with the racers in advance of the race which one was to win. The reputation of the gang was such that bettors on the races could be obtained only from outside of that community, and, in order to allure victims into their net, emissaries were sent out who told seductive stories that appealed strongly to men to whom the hope of obtaining a dishonest gain with seeming immunity from punishment was a temptation. Two of these emissaries, Wasser and Fisher, found the plaintiff in his home in Oklahoma and told him their story, which in effect was that Wasser had been running races for this athletic club, had won many races and much money for the club, but had not been treated fairly by them,—had not been given his fair proposition of the money won; that it was arranged between him and Fisher that they would be the competing champions in a race to be run; the clubmen would, as usual, bet on Wasser, their favorite, and he would allow Fisher to beat him, and thus Wasser, who was a poor boy and had a father to take care of, would be enabled to get back from the unjust

[26] 93 S.W. at 935.

members of the club money that he had really earned but which had been so unjustly withheld from him."[27]

Plaintiff Hobbs bought the story, bet and lost, using the defendant Exchange Bank and Stewart, its cashier, to cash his draft to obtain the money for his bets.[28] Hobbs then sued the Exchange Bank and Stewart to recover his lost bets and obtained a jury verdict and judgment against both.

The Missouri Supreme Court affirmed, after noting, "There is no evidence that Boatright or any of his gang divided the money obtained from the plaintiff with the bank or its officers. . . But the evidence ***tends*** to show that the officers of the bank knew the business these men were engaged in, knew their methods of enticing strangers into their net and fleecing them, yet knowing all this lent to the gang the appearances of respectability that the backing of a banking institution afforded."[29]

The Supreme Court affirmed the judgment because the Bank and its cashier should have reasonably anticipated plaintiff's loss. "They [the Bank and its cashier] could not have helped knowing the nature of the practices, and knowing that, when the plaintiff presented his letter of credit and when he drew his checks, he was going to be robbed of his money."[30]

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[27]Id.

[28]93 S.W. at 936.

[29]93 S.W. at 938.

[30]93 S.W. at 936.

Last, the willful blindness doctrine of *Curlee v Donaldson*,[31] rejects any need for a plaintiff to prove more than constructive knowledge:

> The failure to prove by direct evidence the existence of actual knowledge on the part of Donaldson that these trespasses were occurring does not relieve Donaldson of liability. There was circumstantial evidence of knowledge on his part, including the statement, "I kept in touch with the progress of the work by periodic reports", and in any event, he had constructive knowledge of what was happening. It was his duty to inform himself with respect to the forces he had set in motion, particularly after the departure of his forest foreman. With his complete and "one-man" control of the company business, and easy access to the means of knowledge, Donaldson could and should have known of the trespasses. He is charged with the knowledge of that of which it was his duty to inform himself. He comes within the rule of acquiescence warranting an inference of consent, as stated in Fletcher's Encyclopedia on Corporations, Vol. 3, Section 1135, p. 708: "* * * corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct

[31] *Curlee v Donaldson*, 233 S.W.2d 746 (Mo. App. 1950).

> that which was done in the regular course of that business, * * * with such acquiescence on their part as warrants inferring * * * consent or approval."[32]

Those who practice inside the Federal criminal bar will recognize this as either the *Jewell* rule[33] or a *Cincotta*[34] or *Kaplan*[35] instruction:

> Knowledge under the mail fraud statute could be satisfied by proof that Kaplan 'deliberately closed his eyes to what otherwise would have been obvious to him,' that '[r]efusing to investigate something that cries out for investigation may indicate that the person knows what the investigation would show,'and that willful blindness constitutes knowledge if the defendant 'was aware of a high probability that particular facts existed and he did not subjectively disbelieve the facts.'"[36]

Failing to investigate when the facts cry out for investigation is circumstantial evidence of knowledge:

> The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that

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[32] 233 S.W.2d at 754

[33] *United States v. Jewell*, 532 F.2d 697, 704 n.21 (CA9 1976).

[34] *United States v. Cincotta*, 689 F.2d 238, 244 (1st Cir. 1982).

[35] *United States v. Kaplan*, 832 F.2d 676, 682(1st Cir. 1987).

[36] 832 F.2d at 682.

> would induce most people to acquire the specific knowledge in question. Thus, if someone refuses to investigate an issue that cries out for investigation, we may presume that he already "knows" the answer an investigation would reveal, whether or not he is "certain". *See generally United States v. Jewell*, 532 F.2d 697, 699-704 (9th Cir. 1976). Evidence of conscious avoidance is merely circumstantial evidence of knowledge; a defendant who seeks to refute such evidence follows the same course no matter how the evidence is labeled. In short, a defendant accused of a crime involving knowledge must be prepared to meet both direct and circumstantial evidence, of which "conscious avoidance" is a major subset.[37]

While few Missouri cases have discussed conscious avoidance or blind eye or willful blindness, it is part of our jurisprudence of knowledge and notice.[38]

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[37] *United States v. Cincotta*, 689 F.2d 238, 244 (1st Cir. 1982).

[38] *Bucker v. Jones*, 1 Mo. App. 538, 542 (1877) ("that defendant knew the fact, or would have known it had he not willfully closed his eyes lest he should plainly see the whole truth–which for the purposes of this case, is just the same thing"). *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L & Criminology 191, 191–(1990) (tracing history of willful blindness).

Further, the cases have repeatedly emphasized "'Aiding and abetting,' like any other fact, may be proved by circumstantial evidence."[39]

The doctrine of *Curlee v. Donaldson* was recently reaffirmed in *State ex rel. The Doe Run Resources Corp. v. Neill.*[40] *Doe Run* held that a petition stated a cause of action against a corporation's chief financial officer for aiding and abetting emission of led and other contaminants from a lead smelter. The officer aided by approving "budgets that delayed or rejected the implementation of adequate measures for pollution control."[41] The Supreme Court specifically affirmed four prior court of appeals opinions holding that constructive knowledge was sufficient for aiding and abetting liability:

1) *Grothe v. Helterbrand*;[42]

2) *Lynch v. Blanke Baer & Bowey Krimko, Inc.*;[43]

3) *Boyd v. Wimes*;[44] and

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[39]*Curlee v. Donaldson*, 233 S.W.2d 746, 753[8] (Mo. App. 1950) citing *Willi v. Lucas*, 19 S.W. 726, 727 (Mo. 1892).

[40] *State ex rel. The Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo. 2004).

[41]128 S.W.3d at 505.

[42] *Grothe v. Helterbrand*, 946 SW 2d 301, 304 (Mo.App. 1997).

[43] *Lynch v. Blanke Baer & Bowey Krimko, Inc.* ,901 S.W.2d 147, 153 (Mo.App.1995).

[44] *Boyd v. Wimes*, 664 S.W.2d 596, 598 (Mo.App. 1984).

4) *Rauch v. Brunswig*.[45]

G. The Early Aiding and Abetting Cases.

Missouri's first aiding and abetting case was *Canifax v Chapman & Wills*,[46] an 1841 case. *Canifax* was a conversion case, plead under the form of action of trespass, against a constable for wrongful levy on personal property. Constables have a duty to ascertain the true owner of property before levy. The constable levied at the encouragement of the judgment creditor, making the judgment creditor liable in trespass to the property's owner.

Twelve years later the same principles were applied in another wrongful execution case, *Wetzell v. Waters*.[47] Wetzel was an action for conversion of slaves; the form of action was trespass. The sheriff refused to sell the slaves unless indemnified by the judgment creditors, which was done by a bond of indemnity. The Supreme Court held that the sureties were liable to the owner for the conversion of the slaves by having encouraged the sheriff in making his wrongful levy "by entering into the bond."[48]

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[45] *Rauch v. Brunswig*, 155 Mo.App. 367, 137 S.W. 67, 68 (1911).

[46] *Canifax v Chapman & Wills*, 7 Mo. 175 (1841).

[47] *Wetzell v. Waters*, 18 Mo. 396 (1853).

[48] 18 Mo. at 398.

The 1854 case of *Page v. Freeman,*[49] was an action for assault and battery. The petition stated that the defendant "aided and abetted a certain Jesse Edwards to assault . . . plaintiff:"[50]

> By the common law, all were principals in an assault and battery, as in other trespasses. He who counseled, aided or assisted in any way the commission of the wrong, was, in the eye of the law, as much a principal as he who actually inflicted the blows, and the declaration against him who counseled or aided was, consequently, the same as against him who actually committed the violence.[51]

Chitty[52] and *Canifax*[53] were cited by the Court, as authority.

In early 1861 in Missouri, liability was found for aiding and abetting , in trespass, for conversion of horses. "He who directs or assents to a trespass is liable equally with him who does the act . . . If Defendant caused or directed the horses to be levied on and sold, he was a trespasser, notwithstanding he

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[49] *Page v. Freeman*, 19 Mo. 421 (1854).

[50] 19 Mo. at 421-22.

[51] 19 Mo. at 422.

[52] Joseph Chitty, A Practical Treatise on the Criminal Law (1819) (Google Books).

[53] 7 Mo. 174 (1841).

may not actually have taken them from plaintiff's possession."[54] Within the next decade, civil liability for aiding and abetting completed development in Missouri.

In 1867 the Missouri Supreme Court considered the conversion of goods from a store robbery, in the wake of Sterling Price's late Civil War march through Missouri, holding. "All persons who wrongfully contribute in any manner to the commission of a trespass, or after the same has been committed for their benefit assent to it, are responsible as principal."[55] The Court continued, "In ascertaining the liability of a party in an action of this sort, it is only necessary to show that he participated in the wrong done. The amount of the property taken by him, if indeed he did take any, is wholly immaterial. It is unnecessary likewise to show what degree of efficiency he exhibited in giving aid and countenance to those who actually broke the store."[56]

In 1869, another case of taking a horse (a mare, saddle and bridle) reached the Missouri Supreme Court, leading the Court for the first time to fully and completely state the entire doctrine or theory of aiding and abetting liability:[57]

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[54] *McNelly v. Hunton*, 30 Mo. 332, 334 (1861).

[55] *Allred v. Bray*, 41 Mo. 484, 487 (1867).

[56] Id.

[57] *McMannus v. Lee*, 43 Mo. 206, 208 (1869).

> There seems to be no principle of law better settled than that all persons who wrongfully contribute in any manner to the commission of a trespass, or, after the same has been committed for their benefit, assent to it, are responsible as principals, and each one liable to the extent of the injury done." (*Allred v. Bray*, 41 Mo. 484.)
>
> The law is well laid down that any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal ; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same. (*Brown v. Perkins*, 1 Allen, 89; 3 Greenl. Ev. § 41; Foster, 350; 1 Hale P. C. 438.).[58]

Confused by the many many Missouri cases that speak of the rule in a case for Trespass, some sometimes make the mistake of incorrectly asserting that the principles of aiding and abetting liability do not apply to all torts. The er-

[58] *Accord Murphy v. Wilson*, 44 Mo. 313 (1869) (assault).

ror is this argument is that the early cases use the word Trespass to refer to the form of action for Trespass[59] with the modern cause of action for trespass.[60] Missouri's second and third cases on the aiding and abetting theory were "an assault and battery" yet the supreme court affirmed because "all persons who are present aiding and encouraging a ***trespass***" are equally guilty.[61] In *Haynie v. Jones*,[62] the court of appeals wrote, "As a general rule one who counsels, advises, abets, or assists in the commission by another of an actionable wrong is responsible to the injured party for the entire loss or damage."[63] Missouri has never rejected applying the aiding and abetting theory to any intentional tort[64] and applies the doctrine to claims of negli-

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[59] *See generally* Benjamin J. Shipman, HANDBOOK OF COMMON-LAW PLEADING §§ 35–37 (1923).

[60] PROSSER AND KEETON ON TORTS §6, at 28–30 (5th Ed. 1984).

[61] *Goetz v. Ambs*, 27 Mo. 28, 32 (1859); accord *Page v. Freeman*, 19 Mo. 421, 422 (1854).

[62] *Haynie v. Jones* , 127 S.W.2d 105 (Mo.App. 1939).

[63] 127 S.W. 2d at 111 c.1.

[64] *E.g., Kansas City v. Lane*, 391 SW 2d 955, 959 (Mo App. 1965) (trespass); *Curlee v. Donaldson*, 233 S.W.2d 746, 753 (Mo. App. 1950) (collecting cases); *Haynie v. Jones*, 137 S.W.2d 105, 111 (Mo. App. 1939); *Brown v. Barr*, 171 S.W. 4 (Mo. App. 1914)) (assault); *Murphy v. Wilson*, 44 Mo. 313 (1869) (assault).

gence.[65] Missouri also applies the doctrine when one aids the breach of a fiduciary duty.[66]

H. Intentional Torts.

As for intentional torts, in 1966, the Western District considered a claim for conversion of a deposit of $55.00 to be applied toward the purchase of a used 1957 Lincoln convertible. A verdict for $55.00 in actual damages and $2,500 in punitive damages was affirmed against the used car salesman Livingston who had accepted the deposit because, "The jury could also find that the Defendant Livingston aided and abetted such conversion."[67]

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[65] *Shelter Mut. Ins. Co. v. White*, 930 S.W.2d 1, 3 (Mo. App. 1996); *Campbell v. Preston*, 379 S.W.2d 557, 562 (Mo. 1964); *Casanover v. Villanova Realty Co.*, 209 S.W.2d 556, 560 (Mo. App. 1948).

[66] "A third party who has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." *Massie v Barth*, 634 S.W.2d 208, 211[4] (Mo. App. 1982).

[67] *Coleman v. Pioneer Studebaker, Inc.*, 403 S.W.2d 948, 952 (Mo. App. 1966).

I. Conclusion.

It is anticipated that Defendant Respondent Newman will argue that even though secondary liability in tort for aiding and abetting by providing substantial assistance has been a central to Missouri law for 175 years that such is a rule of law is novel and unprecedented.

Newman can make such an argument only by failing to cite to the court several score of cases, all contrary to his argument. We have taken the time to full trace the path of the doctrine for the last 175 years. While some early cases involved personal injury other cases involved wholly economic loss, such as conversion of property.

Moreover, more than 100 years ago this Court applied the doctrine to fraud. *Hobbs v. Boatright*, 195 Mo. 693, 93 S.W. 934, 939-40 (1906). No case has ever refused to apply the doctrine to any tort.

Last, the policy implications of such a path are stunning. Consider:

1. What if Newmark had paid an ESSI employee for confidential information or a trade secret, instead of assisting the issuance of a false registration statement? Would there be no liability because the employee was in a fiduciary relationship as agent for ESSI?

2. What if Newmark had paid a bribe to an ESSI employee to obtain a contract to provide ESSI with over priced goods or services. Would there be no liability because the employee was in a fiduciary relationship as agent for ESSI?

3. What if Newmark paid an ESSI attorney for information about ESSI negotiation position in its merger with DRS? Would there be no liablity becasue the attorney was in a fiduciary relationship with ESSI?

Respectfully submitted,

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3. Certificate Of Compliance With Rule 84.06(B)

I, John L. Davidson, certify that:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. There are 6,050 words contained in this brief.

/s/John L. Davidson

4. Certificate Of Service

The undersigned certifies that a copy of this notice was filed electronically with the Court on Monday, February 24, 2014 and served by electronic means on all counsel of record.

/S/John L. Davidson